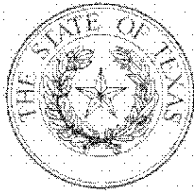


State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

February 13, 2013

Les Trobman, General Counsel
Texas Commission on Environmental Quality
P.O. Box 13087
Austin Texas 78711-3087

Re: **SOAH Docket No. 582-12-5103; TCEQ Docket No. 2011-1786-DIS; In Re:
Application for the Creation of the Municipal Utility District of South Port
Alto in Calhoun County, Texas**

Dear Mr. Trobman:

On January 28, 2013, South Port Alto Municipal Utility District (District), the Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission), and the Office of Public Interest Counsel (OPIC) filed exceptions to the Proposal for Decision (PFD) issued in the above-referenced cause. On February 7, 2013, Robert Bolleter, Lynn Bolleter, Paul Lawson, and Patricia Lawson (participating Protestants) and OPIC replied to the exceptions.

The only recommended change to the PFD is a correction to citations on page 31. Those citations should read 30 Texas Administrative Code § 293.59(k)(2)(C) and 293.59(1)(l), respectively, instead of 30 Texas Administrative Code § 293.11(k)(2)(C) and 293.11(1)(l).

No new issue of law or correction of fact in the record was raised in exceptions filed by the District, the ED, or OPIC. For the reasons set out below, no additional changes to the PFD are recommended.

The District's Exceptions

- **Incongruous Conclusions of Law.** The District disagrees with the ALJ's conclusions stating on the one hand that the Petition is sufficient yet also stating that creation of the District is not feasible, practicable, necessary, or a benefit to all the land in the District.

The ALJ responds that the referenced Conclusions of Law are not incongruous because they address two different matters. Conclusion of Law No. 4 acknowledges that the Petition meets the requirements for administrative completeness, but is not a conclusion that the legal requirements for granting the Petition were met. Conclusion of Law No. 10 addresses whether the District's creation is feasible, practicable, necessary, or a benefit to all the land in the District, and concludes that the aforementioned requirements for granting the Petition were not met.

- **Project.** The District states the PFD ignores State requirements that lots must be at least a half-acre in size to install septic tanks; that Enchanted Harbor Utility is in violation of TCEQ regulations; and that Enchanted Harbor Utility has signed a letter of intent to sell the utility to the District.

The ALJ responds that under the law, the lots in South Port Alto are exempt from the half-acre requirement. *See* PFD at 20-21.

Enchanted Harbor Utility's violations of TCEQ regulations have no bearing on whether the Petition should be granted or denied.

Enchanted Harbor Utility's letter of intent to sell was not ignored in the PFD. *See* PFD at 11 and 18.

- **Tax Rate.** The District disagrees with the PFD's finding that the \$1 per \$100 assessed valuation tax rate is not feasible, asserting that the only evidence against the proposed rate is the participating Protestants' argument that they are on fixed incomes and an increased tax rate would diminish their home values and prevent resale.

The ALJ responds that the PFD acknowledges that the \$1 tax rate is allowable by law. But the \$1 tax rate will only support the District's bond issue if a 95% collection rate is realized. The applicable rule regarding collection rates—30 Texas Administrative Code § 293.59(k)(2)(C)—requires that a 90% collection rate be used in calculating a projected tax rate. The ED's witness Elizabeth "Izzy" Polcyn explained that she used the 95% tax collection rate instead "to ensure the District could absorb the tax rate." Ms. Polcyn's testimony implies that the District could not absorb the \$1 tax rate if a 90% collection rate is realized. The \$1 tax rate is only feasible if a higher-than-allowed collection rate is employed in the tax rate calculation. The ALJ notes that for second and subsequent bond issues, 30 Texas Administrative Code § 293.59(l)(1) also requires the use of a 90% tax collection rate when calculating the projected tax rate, unless the District demonstrates that its historical collection rate is higher.

- **Benefit to All Land.** The District contends there is no evidence that the non-participating Protestants would not benefit from creation of the District. The District claims the PFD ignores the 140 signatures to the Petition in support of District creation. The District cites the Texas Water Code's promotion of the regionalization of water and wastewater service, and concludes that the PFD inappropriately considers the issue of how creation of the District will benefit all land.

The ALJ responds that the non-participating Protestants did not have the burden to show that their land would not benefit from creation of the District. Instead, the District had the burden to show that its creation would benefit all land within its proposed boundaries, including properties owned by the non-participating Protestants. The District did not show how its creation would benefit land owned by the non-participating Protestants, particularly the properties of Herbert Haas and Evelyn Saucier, which have permitted septic systems.

The PFD does not ignore the 140 signatures to the Petition in support of District creation. *See* PFD at 4. But support for the Petition by property owners is not adequate to prove that creation of the District would be a benefit to all land within its proposed boundaries. Instead, the signatures only demonstrate that District creation is supported by persons who collectively hold title to a majority in value of the lands situated in the proposed District, meeting a prerequisite for filing the Petition.

The ALJ recognizes that regionalization is a policy to be encouraged and promoted. But regionalization is not mandatory in this instance, because the District is not located in a standard metropolitan statistical area. The fact that creation of the District would comport with the regionalization policy does not override the requirement that the District must prove that its creation would benefit all the land.

The ED's Exceptions

- **Clarification Regarding the Use of "Original Petition" and "Current Petition."**
The ED points out that only one Petition is at issue in this proceeding.

The ALJ concurs with the ED's observation that there is only one Petition at issue in this proceeding. The terms "original Petition" and "current Petition" are used as shorthand in the PFD to indicate that after the District submitted its Petition, changes were made due to Notices of Deficiency from the ED. The changes did not result in a new Petition. Perhaps more accurate shorthand would have been "the original version of the Petition" and "the current version of the Petition." This clarification does not result in a change to the PFD.

- **Comparable Service.** The ED disagrees with the ALJ's finding that creation of the District is not necessary because on-site septic systems constitute comparable wastewater service and Enchanted Harbor Utility is available to provide comparable water service. The ED's position is that no comparable water or wastewater service exists.

The ED believes that comparable wastewater service refers to other utilities providing similar service, not to on-site septic systems. The ED states that no centralized system providing wastewater service is available within the District's proposed boundaries. The ED states that even if comparable service were to include on-site septic systems, no evidence was presented that the lots within the proposed District could meet all of the requirements of 30 Texas Administrative Code chapter 285 for installation of on-site septic systems.

The ED states that Enchanted Harbor Utility cannot provide comparable water service because its water facilities are inadequate to serve the needs of customers within the proposed District.

The ALJ agrees with the participating Protestants' reply that the ED offers no record evidence, statute, case law, rule, or TCEQ policy that supports its definition of "comparable service." However, the ALJ concedes that Texas Water Code § 54.021(b)(1) could be read to include only centralized systems, in that the examples of other systems listed in the statute are "water districts, municipalities, and regional authorities." But the statute also states that comparable systems are not limited to those examples. The question is whether the "not limited to" language is broad enough to include septic systems, which are recognized by law as a way to treat wastewater.

According to the District's expert witness Joanna P. "Jody" Weaver, P.E., "A properly permitted on-site aerobic septic system meets the wastewater needs of a single-family home." The ALJ believes the wastewater treatment provided by an on-site septic system can be comparable to the treatment provided by a wastewater utility under certain circumstances. For instance, if a subdivision's lots are too small for installation of septic systems, then septic systems would not be available for comparable service. But in this instance, the lots can support septic systems, so septic systems could be viewed as a comparable service. The question is: "Are septic systems comparable to centralized wastewater systems for purposes of the statute?" If the Commission reads the statute to refer only to centralized systems, then the ALJ agrees that Enchanted Harbor Utility and Sunilandings Utilities do not currently have the capacity to provide service to all residents of South Port Alto, and no comparable water or wastewater service is available.

As noted by the participating Protestants in their reply to the ED's exceptions, the District had the burden to prove that homes in South Port Alto cannot meet TCEQ requirements for the use of on-site septic systems and therefore cannot receive comparable service from their use. But the District did not do so. Participating Protestants presented credible evidence that lots in South Port Alto are exempt from the half-acre requirement for installation of on-site septic systems.

Finally, there is no evidence that Enchanted Harbor Utility customers who reside in the District are not currently receiving comparable service or that they will not receive service from Enchanted Harbor Utility in the future. Enchanted Harbor Utility might not have the capacity at this time to offer service to residents who rely on private water wells, but there is no evidence that residents who rely on private water wells are in need of additional or different water service.

- **Projected Construction Costs.** The ED disagrees with the PFD's finding that the proposed construction costs of \$2.26 million is unreasonable. The PFD finds that if District property owners alone were taxed to pay construction costs which would also benefit customers outside the proposed District who would not share in the costs, then the construction costs would not be reasonable. The ALJ also concluded that on-site septic systems for the 96 properties at issue at a cost of about \$6,000 per home can

provide adequate wastewater service and therefore the \$2.26 million in construction costs is unreasonable.

The ED points out that the estimated \$2.26 million in construction costs does not include the cost of providing service to homes outside the District's boundaries; the construction costs only apply to the District and Sunilandings subdivision. The ED states that Texas Water Code § 49.215(f) requires out-of-District customers to be charged rates sufficient to cover both operating expenses and their share of construction costs.

The ALJ responds that the 35 homes in Sunilandings are, in fact, outside the proposed District boundaries, and the District offered evidence that it proposes to provide service to an additional 164 homes outside the District. *See* PFD at 1, footnote 3. The ALJ agrees with the ED that Texas Water Code § 49.215(f) requires out-of-District customers to be charged rates sufficient to cover both operating expenses and their share of construction costs, but notes that no evidence was presented as to how the statute might be applied by the District.

The ALJ responds that participating Protestants presented uncontroverted evidence that the cost of installing an on-site septic system capable of meeting the wastewater needs of a single-family home is a one-time expense of \$6,000. *See* PFD at 24.

- **Tax Rate.** The ED disagrees with the PFD's finding that using a 95% tax collection rate in the projected tax calculation results in an artificially low tax rate. The ED asserts that a 90% collection rate is only a requirement for evaluating a first bond issue.

The ED does not have the information necessary to calculate the effect on the tax rate if the non-participating Protestants' properties were to be removed from the District. Removal of the participating Protestants' properties would not necessitate a tax increase.

The ED observes that the District could shift more of its debt burden to operations and maintenance to keep the tax rate at \$1 or lower, or could sell bonds in multiple series and fund portions of the project over an extended period of time.

The ALJ acknowledges that the ED does not have the information necessary to calculate the effect on the tax rate of removing the non-participating Protestants' properties from the proposed District.

The ALJ also agrees with the ED that the District could shift more of its debt burden to operations and maintenance to keep the tax rate at \$1 or lower, or could sell bonds in multiple series and fund portions of the project over an extended period of time. But the fact that the District could keep the tax rate at \$1 or less by doing these things does not abrogate the requirement that only a 90% collection rate be used in calculating the feasibility of the projected

tax rate. The use of a 95% collection rate is higher than the collection rate to be used in calculating tax rates, as discussed above in response to the District's exceptions.

- **Benefit to the Land.** The ED disagrees with the PFD's finding that the District did not meet its burden by showing the extent of wastewater pollution within its proposed boundaries and, therefore, did not demonstrate that the land would benefit by District creation. The ED argues that all of the properties within the proposed District would benefit from a properly constructed, operated, and maintained central wastewater system.

The ALJ responds that not all of the properties within the proposed District would benefit from a central wastewater system; the participating Protestants clearly demonstrated that their properties would not be benefitted and presented evidence that non-participating Protestants Mr. Haas and Ms. Saucier also have permitted septic systems, so their land might not be benefitted by creation of the District.

The only evidence of wastewater pollution in evidence is H. J. "Butch" Houck's testimony that his septic system discharges directly into Carancahua Bay; that Mr. Houck observed sewage 2-3 inches deep in a back yard at an unspecified address and time; that Mr. Houck and Torsten Normann-Petersen believe, based on sight and smell, that sewage violations exist; that citations for violations were issued for two septic systems in 2008; and that the District's expert witness Ms. Weaver spoke with a Health Department inspector who told her there are septic system violations in South Port Alto. As stated by the participating Protestants in their reply to the ED's exceptions, there is no specific evidence in the record of a current, ongoing wastewater problem that would support amending the PFD to find that the District would benefit all of the land in its proposed boundaries.

- **Regionalization.** The ED disagrees with the PFD's finding that the District did not show that its creation "would do any more to prevent pollution and maintain and enhance the quality of water in Texas than the current use of on-site septic systems and Sunilandings for sewer service within the District's proposed boundaries." The ED maintains that one of the main benefits of a centralized system is that a public entity is responsible for its maintenance and operations. The ED believes that because the purpose of a district is to benefit the community as a whole, the creation of the proposed District is consistent with TCEQ's regionalization policy.

The ALJ responds that the District proved that its plan to provide area-wide sewer service would comport with TCEQ's policy of promoting regionalization of wastewater treatment. *See* PFD at 4 and 42. But the fact that creation of the District would be in accord with TCEQ's regionalization policy is not enough, by itself, to demonstrate that creation of the District is necessary.

OPIC's Exceptions

- **The District is feasible, practicable, and necessary.** OPIC disagrees with the PFD's finding that creation of the District is not feasible, practicable, or necessary. OPIC agrees that the District in its entirety is not necessary, but believes a portion of the District should be created. OPIC points to the testimony of the District's expert witness Ms. Weaver, a civil engineer, that the planned improvements could eliminate raw sewage discharges and overflows that can occur with poorly maintained and aging septic systems.

The ALJ responds that the District did not present evidence sufficient to establish that there is ongoing, current wastewater pollution in South Port Alto that can only be addressed by creation of the District. As participating Protestants propose, any existing pollution problems can be addressed by upgrading or installing on-site septic systems or, in some instances, by connecting to Sunilandings Utilities.

- **Tax Rate.**

OPIC believes that the record establishes that the proposed \$1 tax rate is reasonable and feasible, and suggests that if it is not, it will become apparent in the bond application process.

For the reasons stated above, the ALJ believes the \$1 tax rate is not feasible. In addition, the ALJ agrees with the participating Protestants' reply that it is inappropriate to defer a finding on the reasonableness of the District's tax rate to the bond application process, as it is necessary to make this determination before creating a district.

For the above-stated reasons, the only recommended changes to the PFD are those listed in the second paragraph of this letter.

Sincerely,



Sharon Cloninger
Administrative Law Judge

SC/lh
Enclosures
cc: Mailing List

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STYLE/CASE: SOUTH PORT ALTO MUNICIPAL UTILITY DISTRICT
SOAH DOCKET NUMBER: 582-12-5103
REFERRING AGENCY CASE: 2011-1786-DIS

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HEARINGS**

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